No. 16-15172

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

SHAMROCK FOODS COMPANY,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR PETITIONER-APPELLEE NATIONAL LABOR RELATIONS BOARD

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I. COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under §10(j) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(j).[1] This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). The court below issued its final order granting a temporary injunction on February 1, 2016. (ER 16–19).[2] Appellant Shamrock Foods Company ("Shamrock") filed its timely notice of appeal on February 4, 2016. (ER 21–24.)

II. COUNTERSTATEMENT OF THE ISSUES

1. The district court concluded that Cornele A. Overstreet, Regional Director of Region 28 ("the Director") of the National Labor Relations Board, was likely to succeed in showing that Shamrock violated §§ 8(a)(1) and (3) when it, *inter alia*, discharged a leading union supporter and disciplined another; interrogated employees about their union support and activities and the sympathies of other employees; engaged in surveillance of employees' union or other protected

[1] See the Statutory Addendum, attached to this brief, for the full text of §10(j) and other relevant sections of the Act.

[2] "ER" references are to the Excerpts of Record submitted by Shamrock. "SER" references are to the Supplemental Excerpts of Record that accompany this brief. "BR" references are to Shamrock's opening brief. "ALJD" refers to the decision of the ALJ. "Wallace Supp. Aff." refers to the new Wallace affidavit that the Board moved to enter on March 31, 2016.

activity; threatened employees with loss of benefits if they selected union representation; granted employees benefits in response to their and others' union activity; promised employees increased benefits and improved terms and conditions of employment if they refrained from union organizing activities; and threatened employees with unspecified reprisals because of their activities in support of the union. The court's finding is supported by the transcript, exhibits, and decision of a Board administrative law judge ("ALJ"). Was the court correct in finding likelihood of success?

2. After finding that the Director was likely to succeed on the merits, the district court found that Shamrock's unlawful efforts to thwart the union campaign had already caused a sharp decline in union activity, including a decrease in the number of union authorization cards and a decline in attendance at union meetings. The district court found no evidence that interim relief would harm Shamrock, as the injunction only requires them to comply with the Act. The district court further found that granting the injunction was in the public interest. Given this evidence of irreparable injury to employee statutory rights and a balance of hardships tipping toward granting the injunction, did the district court act within its discretion in granting injunctive relief?

III. COUNTERSTATEMENT OF THE CASE

A. Procedural History

This case is before the Court on Shamrock's appeal from an order of the United States District Court for the District of Arizona, the Honorable Diane J. Humetewa, District Judge, granting the Board's petition for a temporary injunction under § 10(j) of the Act. (ER 2–14.)

On September 8, 2015, the Director, for and on behalf of the National Labor Relations Board ("the Board"), petitioned for § 10(j) relief, pending completion of Board administrative proceedings against Shamrock. (ER 35.) The petition was predicated on unfair labor practice charges filed by the Union, and the Director's issuance of an unfair labor practice complaint on July 21, 2015 (ER 65) and an amended complaint on August 13, 2015. (SER 2.) The amended complaint alleged that Shamrock committed numerous violations of §§ 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3) , in response to its employees' nascent union organizing campaign. The alleged violations included termination of an employee for union activity; discipline of another employee for union activity; threatening, interrogating, and spying on employees; creating the impression of surveillance of employees; instructing employees to report union activities; confiscating union literature; soliciting

grievances and granting benefits to discourage employee support for the Union; and implementing and maintaining myriad overbroad employment rules. (ER 65.)

Before the district court, the Director alleged that there was a strong likelihood that Shamrock violated §§ 8(a)(1) and (3) by: discharging employee Thomas Wallace based on his union activity, disciplining employee Mario Lerma based on his union activity; threatening, interrogating, and surveilling employees because of their protected activities; soliciting employee grievances and granting certain benefits in an effort to undermine union support; confiscating union literature; and promulgating a discriminatory and overbroad rule in response to employees' union activity. (ER 35.) The Director also alleged that Shamrock's conduct poses a significant risk of irreparable harm to the employees' rights under the Act, the Board's remedial authority, and the public interest. (ER 35.) Thus, the Director sought an order requiring Shamrock, *inter alia*, to cease and desist from engaging in the unlawful conduct as described; rescind Lerma's unlawful discipline; and offer Wallace reinstatement. (ER 35.)

On February 1, 2016, based on the parties' oral argument, briefs, exhibits, supporting affidavits, and the transcript and exhibits of the

administrative proceeding, the district court issued its order granting the requested temporary injunctive relief. (ER 1–14.) Shamrock filed a timely notice of appeal on February 4, 2016. (ER 20.)

On February 11, 2016, after 7 days of an administrative hearing held between September 8 to September 16, 2015, the Board's administrative law judge ("ALJ") issued a decision and recommended order finding that Shamrock committed multiple violations of §§ 8(a)(1) and (3) . The ALJ's decision is currently pending review by the Board on Shamrock's exceptions to the ALJ's decision.

B. Background Facts

1. Shamrock's History of Unlawful Response to Employees' Efforts to Organize; the Employees Begin a New Union Campaign

Shamrock is engaged in the large scale manufacturing and processing of dairy products and the wholesale distribution of a variety of food products. The conduct at issue in this matter occurred at Shamrock's Phoenix, Arizona warehouse where it employs approximately 280 employees. (ALJD 2.)

Shamrock has a history of reacting unlawfully to its employees' efforts to organize a union. In 2003, during an organizing campaign with Teamsters Local Union No. 104 at Shamrock's Phoenix warehouse, Shamrock engaged in

a number of unfair labor practices, including firing an active union supporter. *Shamrock Foods Co.*, 337 NLRB 915 (2002), *enforced* 346 F.3d 1130 (D.C. Cir. 2003). The campaign did not result in union representation and the memory of Shamrock's hostile and unlawful reaction still lingers among its tenured employees. (SER 15, 24.)

Despite this history, Shamrock's Phoenix warehouse employees began a new organizing campaign in 2014. In November of that year, longtime forklift operator Steven Phipps contacted the Bakery, Confectionary, Tobacco Workers' and Grain Millers Local 232 ("the Union") regarding representation. (SER 20–24.) The Union advised Phipps to keep the campaign "covert" early on, but by late January 2015, word began to spread "like wildfire".[3] (SER 22, ALJD 3.)

2. Shamrock Responds By Making Threats, Soliciting Grievances, Promising Increased Benefits if Employees Rejected the Union, and Surveilling Employees' Union Activity

Shamrock followed its old playbook. It quickly responded with a barrage of threats and other coercive statements made in both large and small group

[3] All dates are in 2015 unless otherwise specified.

settings.[4] (SER 7, ALJD 3.) During a mandatory "Town Hall" meeting on January 28, Shamrock's Vice President of Operations Mark Engdahl told employees that with a union, everything was "up for grabs" and everything would be "wiped clean" including wages, benefits, and other working conditions. (SER 68, ALJD 4.) He then claimed that it is common for employers to welcome a union in the workplace in order to decrease wages through collective bargaining. (SER 68, ALJD 9.) When he opened the floor for questions, employee Thomas Wallace was one of the first to speak, followed by several other employees who asked questions. (SER 26, 95.)

Also on January 28, then-Human Resources Manager Natalie Wright conducted two smaller "roundtable" meetings with 15–20 employees each, including Phipps. (SER 27, ALJD 6.) Although Shamrock had previously held roundtables with employees, they were historically used to communicate information to employees and only rarely to solicit employee feedback; regardless, the company had not held any roundtable meetings in the previous 15 months. (ALJD 7–8.) Wright requested that employees give their "feedback" on recent workplace changes and solicited "recommendations [for] more

[4] Phipps and Forklift Operator Mario Lerma secretly recorded all but one of Shamrock's meetings regarding the Union campaign. Both the recordings as well as a certified transcript thereof are in the district court record.

changes," while her assistant took notes. (SER 27, ALJD 6.) She told the employees the purpose of the meeting was to find out "what the employer can fix" (SER 27) and pledged to report their concerns to management. (SER 27, ALJD 6.)

In the evening of January 28, the Union held a meeting at a local Denny's restaurant. (ER 107–108, SER 28–29, 120, ALJD 20–21.) Shamrock's floor captain, Art Manning, positioned himself at the entrance of the building and spoke to employees as they walked out. (ER 108, SER 28–29, ALJD 21.) He told at least one employee that the employees did not need a union because they could just go straight to management with their issues. (SER 29.) Several employees saw Manning as they approached the restaurant, but abandoned the meeting and drove away to avoid being seen. (ER 108, SER 28–29.)

3. Wallace Speaks Out At Another Mandatory Town Hall Meeting; Shamrock Discharges Wallace For His Union Activity

Union supporters, including Phipps, Mario Lerma, and Thomas Wallace, continued to collect union authorization cards throughout this period, culminating in a rate of 4.7 new signed cards per week by the end of March. (SER 21, 28–29, 42, 56, 100–101.) On March 31, Shamrock held another mandatory Town Hall meeting, this one led by Vice President of Human Resources Bob Beake. (SER 37–39, 101–102, ALJD 36.) When Beake opened

the floor for employee questions, Wallace asked whether Shamrock would be willing to offer the same health insurance benefits it had offered in the past and, alternatively, whether Shamrock would fund all of the employees' Health Savings Accounts to cover the cost of a new high deductible. (SER 38–39, 101–102, 110–111, ALJD 37.) Dissatisfaction with previous changes to employees' health insurance benefits was one of the factors driving the union campaign. (ER 9, SER 32.) Employees applauded his questions, and Beake answered them, giving no indication that he considered them inappropriate. (SER 39, 102, 110–111.)

Shamrock discharged Wallace less than a week later, on April 6. (SER 39–40, 102–103, ALJD 38.) Warehouse Operations Manager Ivan Vaivao told Wallace that senior management was offended by his questions at the Town Hall meeting. (SER 103, ALJD 38.) Vaivao stated that Shamrock Chief Executive Officer Kent McClelland made the decision himself to fire Wallace so that he could find another job with better health benefits, in obvious sarcastic reference to Wallace's questions at the meeting. (SER 103, ALJD 38.) Vaivao then asked Wallace to sign a separation agreement under which Shamrock would waive a purported $1048 debt for advanced vacation time if Wallace released all claims against the company. (SER 103, ALJD 39.) The agreement

further required Wallace to agree to a variety of terms that would limit his ability to communicate with others. (SER 103, ALJD 39.) Wallace refused to sign the agreement. (SER 103, ALJD 39.)

4. Employee Support for the Union Begins to Wane; Shamrock Continues Making Coercive and Threatening Statements during Anti-Union Meetings; Shamrock Continues to Surveil Employees' Union Activity

Employees began talking about Wallace's discharge almost immediately, and support for the Union began to wane. (SER 40.) Although nine employees had committed to attend the next Union meeting, scheduled for mid-April, only Phipps and one other employee from the organizing committee showed up. (SER 42.) The Union concluded that this warranted a bold move. Phipps subsequently announced his role as a member of the organizing committee during a series of impromptu break room gatherings on April 26 and 27. (SER 42–44.) He offered to field employees' questions and stated that Shamrock was providing a great deal of misinformation about the Union. (SER 43.)

A few days later, on April 29, Shamrock required Phipps to attend a roundtable meeting where Vice President of Operations Engdahl stated that the Union would hurt the company and employees. (ER 256, SER 45–46, ALJD 12–13.) He also stated, emphatically, that Shamrock would not have to agree to anything and that bargaining could go on forever. (ER 261, SER 46, ALJD 13.)

A few hours later on April 29, Shamrock Safety Manager Joe Remblance approached Phipps and another employee while they were in conversation and asked what they were discussing. (SER 46–47, ALJD 22–23.) Phipps found this remarkable because Remblance is not in his supervisory chain and had never approached him with a similar question prior to the Union campaign. (SER 46–47.) The employees told Remblance that they were on break and said that their conversation was work-related, (SER 46, ALJD 22–23), although they had been discussing Phipps' participation in the Union campaign. (ALJD 23.) Remblance continued to lurk until the employees parted ways. (SER 46, ALJD 22–23.)

On May 1, employee Lerma found Forklift Manager David Garcia rifling through his clipboard and other belongings on his forklift. (SER 125–126, ALJD 24.) When Lerma confronted him, Garcia admitted that he was looking for union cards. (SER 126, ALJD 24.) Garcia said that he was shocked to learn that Lerma was distributing cards and told Lerma that his door was always open. (SER 126–127.)

5. Shamrock Disciplines Lerma Because of His Union Activity; Shamrock Continues its Coercive Conduct; Support for the Union Begins to Collapse

On May 5, Shamrock disciplined Lerma. (SER 127–128, ALJD 45.) Vice President of Operations Engdahl and Warehouse Manager Vaivao told him that

they had heard "rumblings coming off the floor" about him "heckling," "insulting," and engaging in "potential slowdown[s]" against coworkers who were not supportive of the Union campaign. (ER 268, 273, SER 127, ALJD 26.) However, both Vaivao and Engdahl admitted that they did not investigate or document this alleged misconduct. (ALJD 28.) During the meeting, Vaivao stated that Lerma could get in "deeper trouble" if employees continued to complain about him. (ER 273, SER 127, ALJD 26.) Engdahl stated that Lerma was "not getting in trouble" at that time, but warned that Lerma would be terminated in the event of another incident. (ER 274, 275–276, SER 127, ALJD 27, 45.) This was effective; after being disciplined, Lerma returned to the warehouse floor and told his coworkers that he would have to take a "backseat" in the campaign for fear of losing his job. (SER 128.) Shamrock never adduced any evidence of this alleged wrongdoing.

On May 8, Chief Executive Officer McClelland sent a letter to all warehouse employees, in which he claimed that employees had been subjected to "threatening, violent, or unlawfully coercive behavior" and, among other things, made it clear that employees were prohibited from engaging in "unlawfully coercive behavior" or "unlawful bullying." (SER 134.) He instructed employees to report such conduct, "however minor," and threatened

that Shamrock would take "appropriate action" upon receiving such reports, "refer[ring] the matter to law enforcement for prosecution to the fullest extent of the law if that is the right course of action." (SER 134.)

Throughout May, Shamrock continued to interfere with its employees' efforts to organize. On multiple occasions, Sanitation Supervisor Karen Garzon confiscated and disposed of Union flyers in the employee break rooms, going so far as to pull them out from under employees' eyes as they were looking at them. (ER 98, ALJD 31.) Shamrock also gave some employees an unexpected and unprecedented dollar per hour wage increase. (ALJD 34.)

In the face of Shamrock's multi-pronged attack on its employees' organizing activity, the Union held a meeting on May 19 in a final desperate attempt to shore up the campaign. (SER 52.) Only five employees attended, none of whom were new supporters. (SER 52.) Although the Union continued to try to reach out to employees, it only collected approximately 15 new authorization cards between Wallace's discharge and the filing of the petition in district court. (ER 101.) This was a sharp decline from the average of 4.7 newly signed cards collected per week in March. (SER 42, 56.)

6. The District Court Grants Injunctive Relief; the ALJ Finds that Shamrock Unlawfully Threatened, Coerced, and Discriminated Against Employees

On February 1, 2016, the district court granted the Director's petition for temporary injunctive relief pending completion of the Board's administrative proceedings against Shamrock. (ER 1–15.) In making its decision, the district court relied upon the transcripts and exhibits of the administrative proceeding.

On February 11, 2016, the ALJ issued his decision in the underlying administrative case. Based on live testimony adduced at the hearing, the ALJ found that Shamrock violated § 8(a)(1) of the Act by threatening employees with loss of benefits and other unspecified reprisals if they supported the Union; soliciting employees' complaints and grievances and promising to remedy them if employees refrained from supporting the Union; instructing employees to report fellow employees' Union conduct to management; interrogating employees about their Union support; surveilling employees' Union activity; creating an impression of surveillance of Union activity; promulgating discriminatory and overbroad rules in response to the Union campaign; removing and disposing of Union literature; and granting wage

increases to discourage support for the Union.[5] (ALJD 59–60.) The ALJ further found that Shamrock violated § 8(a)(3) of the Act by discharging Thomas Wallace and disciplining Mario Lerma in retaliation for their protected activity and to discourage employees from engaging in such activity. (ALJD 61.) Shamrock filed exceptions to the ALJ's decision and the case is pending review before the Board.

7. Shamrock Offers Wallace a Substantial Sum in Exchange For His Waiver of Reinstatement

On February 5, 2016, shortly after the district court granted the injunction, Wallace received a letter from Shamrock offering him $78,000 if he would agree to waive reinstatement. (Wallace Supp. Aff. 1, Ex. A.) On February 8, 2016, Wallace declined the offer by telephone and informed Shamrock that he wanted to return to work. (Wallace Supp. Aff. 2.) Later that day, Shamrock increased its offer to $178,000. (Wallace Supp. Aff. 2.) On February 10, 2016, Shamrock contacted Wallace by telephone to inquire about its most recent offer. Wallace stated that the offer would have to increase significantly if Shamrock did not want him to go back to work. (Wallace Supp. Aff. 2.) The following day, Shamrock contacted Wallace and offered him a

[5] The ALJ also found additional violations that are not included here as they were not alleged in the petition before the district court.

little more than $214,000 if he would agree to waive reinstatement. (Wallace Supp. Aff. 3.) Wallace accepted the offer and went to Shamrock's facility on February 12 to execute the agreement. (Wallace Supp. Aff. 3, Ex. B.) He received a check for the settlement amount on February 15, 2016. (Wallace Supp. Aff. 4.) Wallace states that he "always intended to report back to work if [he] was offered reinstatement. However, when the company offered [him] so much money to decline reinstatement, [he] had to seriously consider it because [he has] five children to support and [he] went through some extreme financial hardships" after his discharge." (Wallace Supp. Aff. 4.)

IV. THE STANDARD OF APPELLATE REVIEW

A district court's grant of § 10(j) relief should be reversed only if "[t]he district court abuses its discretion [by] rely[ing] on a clearly erroneous finding of fact or an erroneous legal standard." *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011) (quoting *Small ex rel. NLRB v. Operative Plasterers' & Cement Masons' Int'l Assoc.*, 611 F.3d 483, 489 (9th Cir. 2010)).

V. SUMMARY OF THE ARGUMENT

The district court correctly determined that the Director will likely succeed in showing that Shamrock interfered with employee statutory rights and violated the Act as alleged. The district court's findings are supported by the transcript and

exhibits from the administrative proceeding and have been bolstered by the subsequent decision of a Board ALJ. They are not "clearly erroneous."

Contrary to Shamrock's red-herring free speech argument, this case raises no potential First Amendment concerns; the district court applied the correct deferential standard in evaluating the Director's likelihood of success. Employer speech in the context of a union organizing campaign is properly analyzed under § 8(c) of the Act rather than the First Amendment, and threatening or coercive employer speech in this context has been unlawful since the earliest days of the Act. The district court did not err in its determination—bolstered by the ALJ decision—that the Director was likely to succeed on the allegations involving employer speech. In any case, even under the stricter standard urged by Shamrock, the record, well-established precedent, and the ALJ decision show that the Director is likely to succeed before the Board.

Moreover, the district court properly exercised its discretion in ordering the interim relief of requiring Shamrock to cease and desist from discharging or disciplining employees because of their activity in support of the Union; engaging in unlawful threats, coercion, surveillance, or interrogation; soliciting complaints and grievances; granting employees benefits to influence their union activity; or otherwise interfering with, restraining, or coercing employees in the exercise of

their rights under the Act. The district court further properly exercised its discretion in ordering Shamrock to rescind Lerma's discipline, rescind the unlawful separation agreement that it offered Wallace at the time of his discharge, offer Wallace reinstatement, and post a copy of the court's order. The court correctly concluded that interim relief was essential to prevent irreparable harm to employee statutory rights, the Board's remedial authority, and the public interest in the collective-bargaining process. This conclusion is well-grounded in § 10(j) precedent, and on the evidence in this case showing that Shamrock's unlawful actions have already affected employee rights and the Union's status, and will likely continue to do so without injunctive relief. After balancing the harms and weighing the public interest, the court properly ordered interim § 10(j) relief.

Accordingly, this Court should affirm the district court's order.

VI. ARGUMENT

A. The Applicable § 10(j) Standards

Section 10(j) of the Act authorizes district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice charges. In enacting § 10(j), Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint.

See Scott v. Stephen Dunn & Assoc., 241 F.3d 652, 659 (9th Cir. 2001); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. at 8, 27 reprinted in 1 Leg. Hist. 414, 433 (LMRA 1947)) .

Section 10(j) directs district courts to grant relief that is "just and proper." In the Ninth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011); *Frankl v. HTH Corp. (Frankl I)*, 650 F.3d 1334, 1355 (9th Cir. 2011). Thus, to obtain a preliminary injunction, the Regional Director must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in the Board's favor, and (4) that an injunction is in the public interest. *Frankl I*, 650 F.3d at 1355 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). These elements are evaluated on a "sliding scale" in which the required showing of likelihood of success decreases as the showing of irreparable harm increases. *See Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131–1135 (9th Cir. 2011). When "the balance of hardships tips sharply" in the Director's favor, the Director must establish only that "serious questions going to the merits" exist. *Alliance for the Wild Rockies*, 632 F.3d at

1131–32, 1134–35. Of course, the Director must always establish "a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies*, 632 F.3d 1131–32, 1134–35.

1. Likelihood of Success

Likelihood of success in a § 10(j) proceeding "is a function of the probability that the Board will issue an order determining that the unfair labor practices alleged by the Director occurred and that the Ninth Circuit would grant a petition enforcing that order." *Frankl I,* 650 F.3d at 1355. *See also Small*, 661 F.3d at 1187. In evaluating the likelihood of success, "it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals." *Frankl I*, 650 F.3d at 1356 (quoting *Miller*, 19 F.3d at 460).

Unlike the underlying administrative proceeding, the Director need not prove by a preponderance of the evidence that the respondent committed the alleged unfair labor practices. *See Scott*, 241 F.3d at 662. Such a standard would "improperly equat[e] 'likelihood of success' with 'success.'" *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). Rather, the Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." *Small*, 661

F.3d at 1187 (quoting *Frankl I,* 650 F.3d at 1356). *See also* S*cott,* 241 F.3d at 662 (the Director need only show "a better than negligible chance of success"). Therefore, in a § 10(j) proceeding, the district court should sustain the Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Regional Director], however novel." *Frankl I,* 650 F.3d at 1356. "A conflict in the evidence does not preclude the Director from making the requisite showing for a section 10(j) injunction." *Scott,* 241 F.3d at 662.

The Director's likelihood of success "is bolstered by the subsequent findings of the administrative law judge to the effect that extensive unfair labor practices had in fact been committed." *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37 n.7 (2d Cir. 1975). As the Board's first-level decision maker, the ALJ presides over the unfair labor practice hearing, evaluates the credibility of witnesses, and resolves evidentiary conflicts. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enforced,* 188 F.2d 362 (3d Cir. 1951). And the "preponderance of the evidence" standard applied by the ALJ is a higher burden than the "likelihood of success" test. Thus, the ALJ's findings and legal conclusions in the underlying administrative case supply a "useful benchmark" against which to weigh the strength of the Director's theories of violation. *Bloedorn v. Francisco Foods, Inc.*,

276 F.3d 270, 288 (7th Cir. 2001); *Pye v. Excel Case Ready*, 238 F.3d 69, 73 n.8 (1st Cir. 2001). While an ALJ's decision is not binding upon the Board, it does represent the findings and conclusions of an independent expert acting in a quasi-judicial capacity. *See Bloedorn*, 276 F.3d at 288. Thus, under any likelihood of success standard, an ALJ's decision finding a violation of the Act supports a showing of likely success.

2. Irreparable harm, balancing the equities, and examining the public interest

In applying traditional equitable principles to a § 10(j) petition, courts must consider the matter in light of the underlying purpose of § 10(j), which is "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Miller*, 19 F.3d at 459–60. As this Court has recognized, "[i]n the context of the NLRA, 'permit[ting an] alleged unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority is irreparable harm.'" *Frankl I*, 650 F.3d at 1362 (quoting *Miller*, 19 F.3d at 460). *See also Small*, 661 F.3d at 1195.

Likely irreparable injury is established in a § 10(j) case by showing "a present or impending deleterious effect of the likely unfair labor practice that would likely not be cured by later relief." *Frankl I*, 650 F.3d at 1362. The Director can make the requisite showing of likely irreparable harm either through evidence

that such harm is occurring, *see, e.g.*, *Scott,* 241 F.3d at 667, 668, or from "inferences from the nature of the particular unfair labor practice at issue [which] remain available." *Frankl I,* 650 F.3d at 1362. The same evidence and legal conclusions establishing likelihood of success, together with permissible inferences regarding the likely interim and long-run impact of the likely unfair labor practices, provide support for a finding of irreparable harm. *Small,* 661 F.3d at 1195 (quoting *Frankl I,* 650 F.3d at 1363). Thus, establishing "a likelihood of success as to a § 8(a)(3) violation with regard to union activists that occurred during . . . an organizing drive largely establishes likely irreparable harm, absent unusual circumstances." *Frankl I,* 650 F.3d at 1363.

The public interest in a § 10(j) case "is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Frankl I,* 650 F.3d at 1365, *quoting Miller,* 19 F.3d at 460. *See also Small,* 661 F.3d at 1196. A strong showing of likelihood of success and of likely irreparable harm will establish that § 10(j) relief is in the public interest. *Frankl I,* 650 F.3d at 1365. *See also Bloedorn,* 276 F.3d at 300.

B. The District Court Correctly Concluded That the Director is Likely to Succeed in Establishing that Shamrock Violated §§ 8(a)(1) and(3)

1. There is a strong likelihood that Shamrock committed the violations alleged

The district court was correct in concluding that the Director is likely to succeed on the merits of the underlying administrative complaint against Shamrock. The record shows that when the employees at Shamrock's Phoenix facility began organizing a union in 2014, the company immediately fought back with a relentless barrage of unlawful propaganda. Employees were compelled to attend mandatory meetings during which high-ranking officials threatened a loss of benefits if they opted for unionization. Other management representatives solicited employee grievances and implicitly promised to remedy them if employees refrained from organizing. There is no factual dispute regarding the unlawful statements at these mandatory meetings; the record includes recordings and transcripts of the meetings. Shamrock also granted certain employees an unplanned and unprecedented wage increase, while reminding all employees that it paid their wages, "not the union." (ALJD 34). A supervisor lurked outside one of the earliest Union meetings and confronted employees as they left. Supervisors repeatedly targeted individual employees to question them about their union sentiment, spy on their protected activity, and create the sense that all of their union activity was under surveillance. And, for its pièce de résistance, Shamrock fired one of the most

outspoken Union advocates and disciplined another, warning him that he too could be fired if his union activity continued. Not only does the record provide ample factual support for the district court's findings, as discussed below, but they are also grounded in well-settled Board law. Indeed, an ALJ has since found that Shamrock engaged in these violations, bolstering the Director's ultimate chance of success and supporting the district court's decision.

Shamrock attempts to diminish its unlawful conduct by dismissively referring to these allegations as "a hodge-podge of casual statements" (BR 30). Shamrock would have this Court believe that the Director has impermissively overreached and intruded on its right to run its business. Yet, the Act does not give an employer the unfettered right to interfere with its employees' desire to form or join a union, or even freely learn about the advantages or disadvantages of unionization. Shamrock should know. It had already road-tested a similar course of conduct: the company's response to its employees' previous union campaign resulted in a Board decision, enforced by the D.C. Circuit, ordering it to refrain from engaging in conduct much like that at issue here. *Shamrock Foods Co.*, 337 NLRB 138 (2002), *enforced*, 346 F.3d 1130 (D.C. Cir. 2003). But no matter how artfully Shamrock attempts to paint its portrait of "innocuous conduct" (BR 2) taken out of context, it has committed myriad unfair labor practices that threaten

the employees' exercise of their § 7 rights and the efficacy of a final Board order. Given "the severity and scope of [Shamrock's] unfair labor practices," (ALJD 62) there is little doubt that the Director will ultimately prevail before the Board.

a. Threats of loss of wages and benefits

Because an employer has the duty to maintain the status quo regarding wages and benefits when its employees elect union membership, *NLRB v. Katz*, 369 U.S. 736, 743 (1962), employer statements that collective bargaining "begins from scratch" violate § 8(a)(1) unless, in context, the employer "makes it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enforced mem.*, 679 F.2d 900 (9th Cir. 1982). *See also, e.g.*, *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 925–26 (D.C. Cir. 2005).The Board will also find vaguer statements about the negative consequences of organizing to be coercive and unlawful. *Downtown Toyota*, 276 NLRB 999 (1985) (statement that the union is "only going to hurt you guys" found unlawful), *enforced mem. sub nom.*, *NLRB v. Sullivan*, 859 F.2d 924 (9th Cir. 1988).

Here, transcripts of the January 28 mandatory town hall meeting show that Vice President of Operations Engdahl made repeated statements violating § 8(a)(1), including: that bargaining would begin at "ground zero," that everything

would be a "blank slate," that there were no guarantees in bargaining, and that some employers allow a union in order to decrease wages through bargaining. He further warned that the Union would hurt employees. Engdahl's statements did not merely depict the "normal give and take of negotiations," but rather threatened that Shamrock would take a regressive bargaining stance in the event of unionization, resulting in losses for employees. The district court correctly found that these statements violated § 8(a)(1), and its conclusions are bolstered by the decision of the ALJ. (ALJD 6.)

Shamrock claims that this Court gave its imprimatur to "nearly identical statements" in *NLRB v. General Telephone Directory Co.*, 602 F.2d 912, 916 (9th Cir. 1979). (BR 26). But the statements in that case are easily distinguished. In *General Telephone Directory*, an employer's general manager explained that a planned future wage increase would be a negotiable item if the employer were bargaining with the union at the time of the scheduled increase. *Id*. at 916 n.8. As this Court found, that statement was a prediction of a possible economic consequence and was therefore protected by § 8(c). *Id*. at 916–17. And, as this Court instructed in that same case, "[i]n determining whether an employer's communications constitute permissible argument or prohibited threats, the statements must be considered in the context of the factual background in which

they were made, and in view of the totality of employer conduct." *Id*. at 915 (quoting *NLRB v. Lenkhurt Elec. Co.*, 438 F.2d 1102, 1107 (9th Cir. 1971)) . Considering Shamrock's statements in the context of its other coercive conduct, discussed in detail below, including interrogation, surveillance of union activity, solicitation of grievances with an implicit promise to remedy them, instruction to report union activity, and the discharge and discipline of open Union supporters, there can be no question that these statements were threatening and coercive in violation of § 8(a)(1).

b. Surveillance

Just as an employer may not create the impression that employees' union activities are under surveillance, it may not actually engage in surveillance. *Flexsteel Indus.*, 311 NLRB 257, 257 (1993); *see also NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978). Although employers may observe "employees conducting their activities openly on or near company premises," *Roadway Package Sys., Inc.*, 302 NLRB 961, 961 (1991), observation of employees becomes unlawful surveillance when it is conducted in such a conspicuous manner that it interferes with employees' protected activities. *See, e.g.*, *Alle-Kiski Med. Ctr.*, 339 NLRB 361, 364–65 (2003); *Basic Metal & Salvage*

Co., Inc., 322 NLRB 462, 464 (1996); *Carry Cos. Of Ill.*, 311 NLRB 1058 (1993), *enforced in relevant part*, 30 F.3d 922, 934 (7th Cir. 1994).

Here, Shamrock engaged in unlawful surveillance on three occasions: Floor Captain Manning stationed himself outside a local restaurant during a union meeting, frightening off would-be attendees and challenging at least one employee about the Union on his way out.[6] Safety Manager Remblance approached Union supporter Phipps—who was not in his chain of command—two days after Phipps announced his leadership role in the union campaign and interrupted and interferred with a conversation he was having with a co-worker about the Union to ask what they were discussing. And Forklift Manager Garcia engaged in blatant surveillance by physically searching through Union supporter Lerna's personal clipboard, admittedly to look for Union authorization cards.[7] The ALJ concluded that all three instances constituted unlawful surveillance. (ALJD 21, 23, 25.)

Shamrock ignores the Remblance and Garcia incidents and attempts to rebut the Manning allegations by citing Manning's testimony before the ALJ that his

[6] Although Shamrock contests Manning's supervisory status, the ALJ concluded that he and the other floor captains are statutory supervisors because, *inter alia*, they have the authority to assign and direct employees using independent judgment, are paid more than the other employees, and regularly attend management meetings. (ALJD 17–18.)

[7] This incident was also alleged as creating the impression of surveillance. The ALJ found both violations. (ALJD 25.)

presence at the off-site Union meeting was not surveillance because he had been invited by employees and left after 30–40 minutes without noticing other employees. Although Shamrock characterizes this testimony as "unrebutted," (BR 31) the ALJ considered and explicitly discredited this testimony in light of the entire record. (ALJD 21 n.37.) Shamrock's conduct demonstrates its active but unlawful pursuit of information to determine which of its employees supported the Union.

c. Solicitation of employee grievances and implied promise to remedy them

The Board has held that an employer's solicitation of grievances chills employees' unionization efforts because it demonstrates both that employees' efforts to unionize are unnecessary and that the employer will only improve working conditions as long as the workplace remains union-free. *See Ctr. Serv. Sys. Div.*, 345 NLRB 729, 730 (2005), *enforced in relevant part*, 482 F.3d 425 (6th Cir. 2007); *Alamo Rent-A-Car*, 336 NLRB 1155, 1155 (2001). This Court has held that solicitation is an unfair labor practice when it is accompanied by an express or implied promise that the grievances will be remedied if the employees do not opt for union representation. *Idaho Falls Consol. Hosp. v. NLRB*, 731 F.2d 1384, 1386–87 (9th Cir. 1984). Here, Shamrock repeatedly solicited grievances and implicitly promised to remedy them in a series of roundtable meetings

commencing soon after it learned of its employees' organizational efforts. Shamrock prodded employees to report their complaints to find out "what the employer can fix." (SER 27.) These repeated solicitations were made at a time when Shamrock was heavily campaigning against its employees organizing efforts—the first such discussion took place immediately after the first mandatory "town hall" meeting, during which Shamrock's vice president threatened loss of benefits if the employees unionized—clearly connecting Shamrock's implied promises to remedy employee complaints to its desire not to have a union.

Shamrock argues that it had a longstanding practice of conducting roundtable meetings with employees, but the ALJ found that the meetings were usually held only to communicate information to employees rather than to solicit feedback. (ALJD 7.) The ALJ further noted that Shamrock had not held any roundtable meetings for the previous fifteen months and presented the first of these meetings as the beginning of a series to gather employee feedback. (ALJD 7–8.) The rare occurrence of these meetings and the unusual nature of soliciting feedback shows that Shamrock held the meetings in response to its employees' interest in unionization. The ALJ found that Shamrock's solicitation of grievances and implicit promise to remedy them constituted a violation of § 8(a)(1). (ALJD 8, 9.)

d. Interrogation

In determining whether an unlawful interrogation occurred, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177–78, 1178 n.20 (1984), *enforced* 760 F.2d 1006 (9th Cir. 1985), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Relevant factors include: the background, including any history of hostility and discrimination; the nature of the information sought; the identity of the questioner, including the person's position in the employer's hierarchy; the place and method of the questioning; and the truthfulness of the employee's response. *Medcare Assoc., Inc.*, 330 NLRB 935, 939 (2000). Here, the District Court correctly found that the Director is likely to succeed in establishing that Shamrock engaged in unlawful interrogation. Although the ALJ dismissed one allegation of unlawful interrogation (ALJD 18–19), he found three other instances of unlawful interrogation. On January 28, a supervisor two levels above Wallace directly questioned him about his union sympathies. The ALJ found this to be unlawful interrogation under §8(a)(1) (ALJD 20) because it was aimed at ascertaining information about a fledgling organizing campaign at a time when Shamrock was displaying extreme hostility. Similarly, on April 29, two days after Phipps announced his role as a

leader of the organizing campaign, a supervisor approached him and another employee while they were on break and asked what they were talking about. The ALJ concluded that, in context, this was unlawful interrogation. (ALJD 23.) And on May 25, a supervisor confiscated Union flyers as employees were looking at them—a violation in its own right, *see infra* Section VI.B.1.f—and, when confronted, asked the employees whether they wanted the flyers back. The ALJ found that "[c]onsidering all the circumstances, particularly the fact that she was their direct supervisor," (ALJD 33) this constituted unlawful interrogation in violation of § 8(a)(1). (ALJD 33.)

e. Directing employees to report Union activity

The Board has long recognized that employer requests that employees disclose their coworkers' union and protected concerted activities, even when cloaked in other terms, violate the Act. *See, e.g.*, *Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003) (letter to employees requesting they let the employer know if employees are "threatened" or "harassed" about signing a union card unlawful), *enforced*, 357 F.3d 692 (7th Cir. 2004); *Arcata Graphics/Fairfield, Inc.*, 304 NLRB 541 (1991). Shamrock twice asked its employees to report their fellow employees' union activities. During a "union education" meeting, Warehouse Operations Manager Vaivao asked employees to raise their hands and inform

management if someone was bothering them. Chief Executive Officer McClelland similarly invited employees to report their coworkers' union activities by urging employees to "promptly report" conduct including "unlawful bullying" and "unlawfully coercive" behavior, "however minor," and then threatening prosecution of reported employees. This broad language communicated during an organizing campaign would lead employees to believe it was aimed at prohibiting union activities. The coercive nature of the request was amplified by the threat of prosecution. *See RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1638 (2001), *enforced*, 281 F.3d 442 (4th Cir. 2002). The ALJ concluded that both of these incidents violated § 8(a)(1). (ALJD 10, 31.)

f. Confiscating Union literature

Confiscation of union literature, which employees have a well-established right to possess, is unlawful, even in areas where an employer could lawfully prohibit distribution of literature. *Manor Care of Easton, PA, LLC*, 356 NLRB 202, 204 (2010), *enforced on other grounds*, 661 F.3d 1139 (D.C. Cir. 2011) . Here, Sanitation Supervisor Garzon confiscated Union literature from the breakroom, sometimes going so far as to pick up flyers from between the arms of employees looking at them. Given employees' statutory right to distribute and possess union literature, Shamrock's defense based on its alleged right to remove "unattended"

union literature and deal with it in the same manner as other written materials is not only factually misleading, but also entirely ignores well-settled Board law. (BR 45.) The ALJ concluded that this violated § 8(a)(1). (ALJD 31–32.)

g. Increased wages

Promising and granting increased benefits after a union campaign commences squarely violates § 8(a)(1) of the Act. "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Thus, granting benefits during an organizing campaign in a way that employees would reasonably view as an attempt to interfere with their choice of representative gives rise to an inference of improper motivation. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1089 (2004), *enforced*, 174 Fed. Appx 631 (2d Cir. 2006). Here, Shamrock granted certain employees a dollar per hour raise in May. This was not a regular or anticipated raise. At the time, Shamrock was well aware of the ongoing Union campaign and was several months into its own forceful anti-union campaign. Shamrock had taken pains to remind employees "that it was 'the company' that pays wages, 'not the union.'" (ALJD

34.) Here, Shamrock would have the Court believe that wages were increased in pursuit of legitimate business interests. (BR 36.) Shamrock did not present this defense before the ALJ, and does not present any evidence to support this defense other than Vaivao's self-serving assertion that the wage increases were business-related. (ER 294–295.) The ALJ found that this was a classic example of "a fist inside a velvet glove" and concluded that the raises violated § 8(a)(1). (ALJD 34–35.)

h. Wallace's Discharge

Section 8(a)(3) prohibits discrimination against employees on the basis of their union activity. 29 U.S.C. § 158(a)(3). In unlawful discrimination cases, employer motive is the critical question. *NLRB v. Brown Food Store*, 380 U.S. 278, 286-87 (1965). Accordingly, when an employer's opposition to union activity is a motivating factor for an employee discharge, that action constitutes unlawful discrimination unless the employer demonstrates by a preponderance of evidence, as an affirmative defense, that it would have taken the same action notwithstanding the employee's union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399–403 (1983) (approving *Wright Line*, 251 NLRB 1083, 1088 n.11, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)) . *See Healthcare Employees Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006). Shifting

justifications support an inference of unlawful motive. *See, e.g.*, *Lucky Cab*, 360 NLRB No. 43, slip op. at 6 (Feb. 20, 2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). Once it is proved that the reason advanced by the employer did not exist or was not in fact relied upon, the employer's burden is not met, and the inquiry is at an end. *Wright Line*, 251 NLRB at 1084. *See Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Applying these principles, the district court correctly concluded that Shamrock discharged Wallace for discriminatory reasons.

The district court's conclusion that Shamrock discharged Wallace because of his protected union activity is well supported by the record and as a matter of law. (ER 10–11, ALJD 39–42.) Wallace was an open Union supporter. He publicly spoke up at two large "town hall" meetings. At the first, he asked several questions about unionization, including why Shamrock was not unionized when its competitors are. (ER 9, SER 26, 95.) At the second, he asked questions about and expressed dissatisfaction with the employer's health insurance plan, which Shamrock knew was one of the factors driving union activity. (ER 9, 259.) He attended a Union meeting that was unlawfully surveilled by a supervisor and signed a Union card at that meeting. (ER 9, SER 97, 101.) He subsequently solicited Union authorization cards from at least two additional employees. (ER 9,

SER 101.) Immediately after he spoke up at the first "town hall" meeting, a supervisor unlawfully interrogated him about his support for the *Uni*on. (ER 9, SER 96, ALJD at 20.) The numerous § 8(a)(1) violations found here by the ALJ and on which the district court found a likelihood of success, as well as Shamrock's prior history of unlawful response to a union organizing campaign, support a finding of anti-union animus. *See, e.g. Metro-West Ambulance Svce.*, 360 NLRB No. 124, slip op. at 1 (May 30, 2014) (multiple § 8(a)(1) violations reflect strong anti-union animus), *petition for review dismissed mem. Metro West Ambulance Svce. v. NLRB*, Nos. 14–1106, 14-1137, 2015 WL 9309625 (D.C. Cir. Dec. 2, 2015).

All of Shamrock's asserted justifications for the discharge are easily dismissed as pretextual. Shamrock argues that Wallace's protected activity was unknown to it and that he was discharged for "storm[ing] out of a meeting." (BR 44.) The contention that Shamrock was unaware of Wallace's union activity is patently absurd, given the extent of his open union activity as specified above. Similarly unavailing is Shamrock's contention that Wallace was discharged for storming out of a meeting. This is one of several justifications proffered—and rejected by the ALJ—during the administrative process. Initially, Shamrock filed a written position statement claiming that Wallace was discharged for "belligerently

interrupting a senior Company official multiple times" and because he "abruptly left the meeting without permission." (ALJD 40.) The district's court conclusion that this was pretextual is well-supported by the factual record, particularly because the court listened to an audio recording of the meeting and noted that Wallace's "tone was not at all disrespectful or belligerent." (ER 10.) But at the administrative hearing, Shamrock claimed that Wallace was discharged for making a "dismissive waving gesture forward" as well as for leaving without permission. (ALJD 40.) In light of these shifting reasons, among other things, the ALJ similarly rejected this, as well as Shamrock's other explanations for the discharge, as pretext. (ALJD 40–41.)

i. Lerma's Discipline

Similarly, the district court correctly concluded that the Director was likely to prevail on the allegation that Lerma's discipline was unlawfully motivated. Shamrock was well aware of Lerma's active Union support at the time of his discipline, coming as it did mere days after a supervisor rifled through his personal belongings in search of Union cards. And there is strong circumstantial evidence that Lerma's alleged misconduct was not the real reason for disciplining him, particularly the fact that Shamrock never investigated the alleged misconduct. (ALJD at 45.) Despite Shamrock's contention that this incident did not constitute

discipline, it concedes that "counseling" represents the first step of its progressive disciplinary process. (BR 38–39.) *Cf. Altercare of Wadsworth*, 355 NLRB 565 (2010) (finding employer's verbal warnings to several employees constituted discipline despite not being recorded in personnel files, as warnings were part of the employer's progressive disciplinary system and these were administered by high-ranking officials). Moreover, Engdahl's assurance that Lerma was "not getting in trouble" at that time was accompanied by the specific warning that he would be discharged the next time. (ER 274–276, ALJD at 45.) The ALJ found that Shamrock disciplined Lerma in violation of § 8(a)(3) to "discourage him from continuing to solicit support for the union." (ALJD 45.)

In sum, the district court correctly found that the Director is likely to succeed in establishing that Shamrock violated § 8(a)(1) and § 8(a)(3).

2. The District Court Applied the Correct Standard in Assessing the Likelihood of Success on the Merits.

As noted above, the standard for granting a temporary injunction is well established in this Circuit. *See supra* Section VI.A. This is the same standard that the district court applied, and this Court affirmed, in *Overstreet v. Bhd. of*

Carpenters, 409 F.3d 1199, 1204–06 (9th Cir. 2005).[8] Contrary to Shamrock's contention (Br. 14–15), *Overstreet* does not mandate a heightened standard to establish "likelihood of success" in this case. *Overstreet* held that courts need not defer to the Board's assessment of the merits where the case turns on Constitutional issues, which are beyond the Board's expertise. *Id*. at 1208 n.13, 1209 (noting that courts refuse to accord deference to the Board's interpretation of § 8(b)(4) when Constitutional rights are implicated because of the "need to avoid First Amendment concerns absent clear congressional intent"). Conversely, "likelihood of success should be adjudged *with* deference to the NLRB in mind where such deference will ultimately be applicable on the merits." *Id*. at 1208 (emphasis in original). This case, unlike *Overstreet*, clearly belongs in the latter category.

In *Overstreet*, the Board sought to enjoin, as proscribed secondary conduct, a union from posting banners on public property near companies that did business with non-union contractors. *Id*. at 1199. The banners contained simple language proclaiming a "labor dispute" and "shame on" the named companies. *Id*. at 1202. There was nothing threatening or coercive about the language of the banner on its

[8] In that case, the petition for temporary injunctive relief was brought pursuant to §10(l) rather than §10(j). However, as this Court noted, the same standard applies. *Overstreet v. Carpenters*, 409 F.3d at 1206.

face or the behavior of the union members displaying them. *Id*. at 1211. Thus, the banners in *Overstreet* were like "billboards and signs [that] are generally accorded full First Amendment protection," *Id*. at 1211, and raised a constitutional issue that is not "the province of the NLRB." *Id*. at 1209. As this Court recognized, such conduct has been the subject of Supreme Court litigation concerning the relationship between the Board's prohibition on secondary boycotts and the First Amendment rights of the affected unions. *Id*. at 1210–1212 (citing *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Moreover, the lawfulness of such banners was, at the time, an unsettled question under Board law. *Overstreet*, 409 F.3d at 1203 n.7 (noting that ALJs confronted with similar conduct were split over whether or not such banners violated the Act). Indeed, the Board subsequently concluded that these union banners did not violate the Act. *See, e.g.*, *United Bhd. Of Carpenters Local 1506 (Eliason & Knuth of Ariz.)*, 355 NLRB 797 (2010).

Similarly, *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950 (9th Cir. 2010), involved issues of free press and editorial control of newspapers (Br. 15), issues over which the Board claims no particular expertise.

Unlike *Overstreet* or *McDermott*, the instant case involves well-settled principles of Board law and raises no colorable First Amendment concerns. Section 8(c) of the Act incorporates First Amendment protections for an employer's expression of views on unionization while prohibiting communications that threaten or coerce employees. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (internal citations omitted). Although the enactment of § 8(c) "manifested a congressional intent to encourage free debate on issues dividing labor and management," *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008), threats, veiled or direct, are proscribed. *See NLRB v. Basin Frozen Foods*, No. 92-70637, 1994 WL 790825, at *2 (9th Cir. Mar. 4, 1994) (finding that comments that appear harmless in isolation are, in context, unlawful veiled threats), and *NLRB v. Four Winds Indus., Inc.*, 530 F.2d 75, 78 (9th Cir. 1976) (finding unlawful "thinly veiled" threats that, on the whole, convey that voting for a union would result in job loss). Thus, an employer's right to communicate its views does not give it free rein to trample its employees' rights under the Act. Moreover, the balance between the two competing sets of rights must be analyzed in the context of the "economic dependence of the employees on their employers . . . ." *Gissel Packing*, 395 U.S. at 617. By enacting § 8(c), Congress entrusted the Board with the primary responsibility for balancing these competing interests rather than leaving it to the

courts to adjust on a case-by-case basis. *Brown*, 554 U.S. at 67–68. Accordingly, unlike cases involving advocacy signage or freedom of the press, the determination that Shamrock's myriad coercive and threatening statements exceed its rights under § 8(c) and violate § 8(a)(1) is firmly within the Board's expertise.

Indeed, since *Gissel Packing*, there is a vast universe of Board law delineating what is unprotected employer speech under § 8(c) and § 8(a)(1). Courts of appeals have routinely granted the usual deference to these Board determinations of unprotected threats and other coercive statements. *See*, *e.g.*, *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 925–26 (D.C. Cir. 2005) (enforcing Board order finding employer statements that employees would "start from zero and would negotiate from that" violated § 8(a)(1); rejecting employer's argument that statements were protected by § 8(c)); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1137 (D.C. Cir. 2003) ("[r]ecognizing the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, we find nothing unreasonable in the Board's conclusion that these conversations . . . were sufficiently coercive to violate the Act" (internal quote omitted)). Because courts of appeals apply deferential review to Board determinations of protected antiunion campaign speech versus unprotected antiunion threats and coercion, likelihood of success under §

10(j) is similarly "adjudged *with* deference," *Overstreet*, 409 F.3d at 1208, in cases involving § 8(a)(1) allegations. *See, e.g.*, *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570–71 (7th Cir. 1996) (reversible error for district court to deny § 10(j) injunction where regional director "presented evidence sufficient to demonstrate . . . better than negligible chance of prevailing before the Board" on § 8(a)(1) allegations including threats, interrogation, and solicitation of employee grievances); *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 25–26 (1st Cir. 1986); *cf. Seeler v. Trading Port*, 517 F.2d 33, 36–37 (2d Cir. 1975) (applying deference under "reasonable cause" test). Shamrock points to no case in which a non-deferential "likelihood of success" standard was applied to allegations involving antiunion threats, interrogations, and other § 8(a)(1) allegations; the Director has found none.[9] In granting the request for temporary injunctive relief,

[9] Even under the inapplicable non-deferential standard, the Director has established a likelihood of success on the merits. The district court relied on the administrative record, including audio recordings and transcripts from many of the meetings where Shamrock made unlawful threats and other coercive statements, in addition to witness testimony from the administrative hearing before the ALJ, and witness affidavits, to determine that Shamrock had unlawfully threatened, coerced, and interrogated its employees. These are all well-established violations of § 8(a)(1), consistent with precedent, and are now strengthened by the ALJ decision finding these violations. Even under a stricter standard, the Director has shown that he is likely to succeed before the Board.

the district court correctly rejected Shamrock's First Amendment argument and applied the proper standard. (ER 5.)

3. The District Court Correctly Concluded that Serious Irreparable Harm is Likely to Result Absent an Injunction

a. The chilling effect of Shamrock's unlawful conduct is likely to result in irreparable harm, absent injunctive relief

The district court correctly concluded that the Director established that irreparable injury will likely occur in the absence of injunctive relief, including an order requiring that Shamrock cease and desist its unlawful conduct, rescind its unlawful discipline of Lerma, and offer Wallace reinstatement. The court's conclusion was based on well-established § 10(j) precedent, and on evidence showing that Shamrock's unlawful actions have already adversely affected employee rights and the Union's status. As the district court noted, the precipitous drop-off in Union support is likely due to Shamrock's "ongoing efforts to discourage union activity." (ER 12.)

The district court correctly concluded that Wallace's discharge had a chilling effect on other employees that alone is sufficient to sustain a finding of irreparable harm. (ER 12–13.) The "discipline and 'discharge of active and open union supporters' sends a message that the employer will take action against union supporters, which adversely impacts employee interest in and support of unionization." *Frankl ex rel NLRB v. HTH Corp. (Frankl II)*, 693 F.3d 1051, 1066

(9th Cir. 2012) (quoting *Pye v. Excel Case Ready*, 238 F.3d 69, 74 (1st Cir. 2001)). When a union activist like Wallace is discharged, the remaining employees receive the inescapable message that ongoing union activity will cost them their jobs and neither the Board nor the Union can provide a timely remedy. *See Pye*, 238 F.3d at 75. Absent prompt injunctive relief to counteract that message, those remaining employees, especially ones who were undecided about organizing, will not participate in the campaign or support the Union after seeing what happened to the outspoken supporters. *Id*. at 74–75, 76; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573, 1575 (9th Cir. 1996) (employees who "know what happened to the terminated employees [will] fear that it will happen to them" and will refrain from union activity). In those circumstances, no worker "in his right mind" will "participate in a union campaign… ." *Silverman v. Whittal & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, *1 (S.D.N.Y. 1986). This is precisely the harm that § 10(j) is intended to prevent. *See Pye*, 238 F.3d at 75 ("Section 10(j) interim relief is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining").

With employee union activity stifled and union support strangled, the Board's eventual final order will be an "empty formality." *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). *See also Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874,

878-79, 81 (3d Cir. 1990) (chilling effect of retaliation against union activists cannot be undone by eventual Board order). An interim offer of reinstatement is necessary to prevent this chilling impact on employee § 7 rights that threatens the effectiveness of the Board's remedial power. *Angle*, 382 F.2d at 660–661 (when the Board finally acts, "the employees then at the plant may not wish to exercise the rights thus secured to them. … [interim] [r]einstatement of the illegally discharged employees is the best visible means of rectifying this"). The district court's injunction sends an affirmative signal that the Board will timely protect them if they face retaliation for participating in the campaign or supporting the Union. *See Pye*, 238 F.3d at 74–75; *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749–750 (9th Cir. 1988) (an offer of interim reinstatement "would revive the union's organizational campaign"); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 886 (N.D. Ala. 1985) (interim reinstatement offer appropriate to send "an affirmative signal that further union activity will not cause the kind of Company retaliation that has occurred in the past").

These concepts are well-established; as this Court has held, "a likelihood of success as to a § 8(a)(3) violation with regard to a union activist that occurred during . . . an organizing drive largely establishes likely irreparable harm, absent unusual circumstances." *Frankl I*, 650 F.3d at 1363. There are no such "unusual

circumstances" here. On the contrary, the evidence shows that the predictable harm is occurring. After Wallace's discharge, attendance at Union meetings plummeted and the number of new authorization cards signed dropped to near zero. (ER 12–13.) And despite Shamrock's assertion, the Union's filing and subsequent withdrawal of a charge alleging majority status and requesting a bargaining order does not rebut this evidence. (BR 46.) The charge is not an "admission" of robust Union support, nor does it constitute proof of anything. The charge itself provides no context or evidence regarding the extent, timing, or trend of Union support. And nothing in the charge rebuts or undermines the evidence in Phipps' affidavit regarding the decline in Union activities and support. (ER 93–94, ER 101.)

Further, Shamrock's pervasive and repeated violations of § 8(a)(1) and (3) , including, *inter alia*, threats, surveillance, interrogation, wage increases, the solicitation of grievances, and the discriminatory discipline of an open Union supporter, are all likely to cause the irreparable erosion of employee support for the Union and harm to the Board's remedial authority. Several of the § 8(a)(1) violations—such as the increased wages and promises to remedy solicited grievances—are "hallmark" violations, which the Board and the courts deem to be "as highly coercive in [their] effect as discharges or threats of business failure." *Scott ex rel. NLRB v. Stephen Dunn & Assoc.*, 241 F.3d 652, 666 (9th Cir. 2001)

(in context of propriety of interim bargaining order). *See also, e.g., NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980). Harm to employee interest in unionization is not likely to be undone by a final Board order because that order cannot erase the "chilling effect" that Shamrock's conduct has had on employee support for the Union in the interim.

Contrary to Shamrock's representation (BR 47), it is clear that the district court considered the totality of Shamrock's unlawful conduct, including the threatening and coercive statements at the mandatory meetings, the interrogations, the surveillance, and the wage increase. The court acknowledged as much when it stated that,"[T]he Court agrees with [the Director] that the drop-off [in Union support] likely began as a result of [Shamrock's] *ongoing efforts to discourage union activity*." (ER 12.) (Emphasis added.) If the court was only focused on the harms resulting from Wallace's discharge, it would not have referred in the plural to "ongoing efforts." Regardless, the district court's failure to discuss each § 8(a)(1) allegation in detail or to enumerate their specific adverse impact is not reversible error where the record, the nature of the violations, and the case law establish that coercive conduct like Shamrock's leads to likely irreparable harm to employees' rights under the Act.

Shamrock's contention that the district court abused its discretion in issuing a broad injunction (BR 48) also must fail. Employees' faith in the Board's ability to protect their rights is clearly being undermined by Shamrock's pervasive and continued disregard for their § 7 rights. Shamrock is a recidivist employer; during the last union campaign at this facility, the Board found that it had committed and ordered the company to cease and desist from committing precisely the same types of violations found in the instant case. *Shamrock Foods Co.*, 337 NLRB 915, 925 (2002) (ordering Shamrock to cease and desist from discharging employees for union activity; interrogating employees about their union activity; surveilling employees' union activity; and soliciting employees to report other employees' union activity to management), *enforced Shamrock Foods Co. v. NLRB*, 346 F.3d 1130 (D.C. Cir. 2003). Despite Shamrock's protestations (BR 23, 50–51), the district court's order does not prohibit it from lawfully communicating with its employees, including non-coercive statements regarding its views on unionization; managing its workplace; or protecting its legitimate business interests. Shamrock is merely enjoined from further violating the Act. The injunction is nearly coextensive with the order issued by the Board and enforced by the D.C. Circuit in its previous unfair labor practice case. And it is even less comprehensive than the order proposed by the ALJ, who found additional violations that were not alleged

in the petition before the district court. The court's injunction order is merely broad enough to cover the breadth of Shamrock's unlawful conduct, and necessary to assure employees that they may exercise their statutory rights without further coercion. Given the entirety of Shamrock's conduct, including its history of similar prior violations of the Act, the injunction is an appropriate exercise of discretion.[10] *See, e.g.*, *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133, 1135 (10th Cir. 2000) (order to cease and desist from alleged violations was proper additional relief to preserve Board's ultimate remedial authority); *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 970–71 (6th Cir. 2001) (order to cease and desist from further discrimination not an abuse of discretion); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1575 (7th Cir. 1996) (enjoining employer from committing further unfair labor practices).

[10] Moreover, the court did not abuse its discretion by issuing a cease-and-desist order enjoining Shamrock from "in any other manner" interfering with its employees' § 7 rights. (ER 17.) This Court has recognized that such an order is appropriate to help prevent future violations of the Act "when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Frankl II*, 693 F.3d at 1061 (quoting *NLRB v. Blake Constr. Co., Inc.*, 663 F.2d 272, 285 (D.C. Cir. 1981)).

4. Wallace's decision to decline reinstatement does not remedy the irreparable harm caused by Shamrock's unlawful conduct

Shamrock claims that this Court is precluded from considering the irreparable injury stemming from Wallace's unlawful discharge because Wallace has declined reinstatement. (BR 49.) But Wallace's decision to accept a sizeable cash settlement in lieu of reinstatement does nothing to remedy the irreparable harm to the remaining employees or to the Board's ultimate remedial authority that resulted from his unlawful discharge. The purpose of the injunction is not merely to provide a remedy for Wallace alone, but rather to prevent irreparable harm to the rights of all of Shamrock's employees and the public interest. *See Aguayo*, 853 F.2d at 750 (noting "predominant focus under Section 10(j) is the harm to the bargaining process, not to individual employees"); *see also, e.g.*, *Bloedorn*, 276 F.3d at 300 ("the interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process'"); *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d 902, 906–907 (3d Cir. 1981) (noting that the Board seeks Section 10(j) relief on behalf of the public interest, not on behalf of individual employees). Thus, even though Wallace has not returned to work, the fact that the district court required Shamrock to make such an offer has an ameliorative effect on other employees' willingness to exercise their protected rights under the Act.

Moreover, the injunction sought to protect employees' rights and the public interest by requiring not only an offer of reinstatement to Wallace, but by also enjoining further discriminatory discharges and including numerous prohibitions against Shamrock's myriad other unfair labor practices. The injunction further ordered the rescission of discipline to another employee and the posting of the district court order. An offer of reinstatement to Wallace and his acceptance or rejection do not, on their own, address all of these harms or obviate the need for these other critical provisions of the court's injunction order.

C. The District Court Correctly Balanced the Respective Harms and Properly Concluded that an Injunction will Serve the Public Interest

Given its findings that the Director is likely to prevail in establishing the violations alleged and that irreparable injury is likely to occur without injunctive relief, the district court evaluated the relative harms to the parties and the public interest and properly concluded that the balance of harms favors injunctive relief. (ER 13–14.)

In contrast to the likely irreparable harm to employee rights and the Board's remedial authority, the district court correctly found no countervailing harm from imposing temporary injunctive relief. Indeed, the court found that the injunction "would simply require [Shamrock] to cease any unlawful conduct." (ER 13.)

Shamrock's assertion of extensive harm to its interests would require this Court to accept a view of the underlying facts that has already been rejected by both the district court and the ALJ. There is nothing unusual or burdensome about the district court's order. It is similar to the court-enforced Board order to which Shamrock was already subject in the prior unfair labor practice case, *Shamrock Foods Co.*, 337 NLRB at 925, and similar to other § 10(j) injunctions. *See, e.g.*, *Overstreet v. One Call Locaters Ltd.*, 46 F.Supp 3d 918, 931 (D. Ariz. 2014) (injunction granted in relevant part where allegations included discharge of a union supporter, solicitation of grievances, and grant of new benefits); *Overstreet ex rel. NLRB v. Albertson's*, 868 F.Supp.2d 1182, 1201 (D.N.M. 2012) (injunction issued where allegations included discharge of union supporter, threats, surveillance, and solicitation of benefits). Accordingly, the risk that, under the injunction, Shamrock will be required to do anything other than what it is required to do by the law is very slight. In fact, when the Director establishes a "strong likelihood of success" that the respondent violated the Act, there is no "significant weight" to the respondent's assertions of harm from complying with the law. *Frankl I*, 650 F.3d at 1365. In any event, the risk of an erroneous interim order is attendant in all § 10(j) proceedings as a risk of "carrying out sound labor law policy." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1055 (2d Cir. 1980).

Finally, the district court correctly concluded that injunctive relief in this case is in the public interest. (ER 13–14.) By "mak[ing] a strong showing of likelihood of success and likelihood of irreparable harm, the Director [] establishe[s] that preliminary relief is in the public interest." *Frankl I*, 650 F.3d at 1365. Thus, the district court properly granted the injunction requested by the Director.

D. Wallace's Decision Regarding Reinstatement Does Not Moot the Injunction

Contrary to Shamrock's assertion (BR 52), Wallace's decision regarding the offer of reinstatement does not moot any part of the interim relief granted.[11] As an initial matter, Shamrock was required to offer Wallace reinstatement pursuant to the §10(j) injunction, and only offered him reinstatement to comply with the injunctive decree. Shamrock's compliance with the district court's injunctive decree and Wallace's decision regarding the offer do not obviate the need for the provisions of the injunction to remain in effect. *See, e.g.*, *Kobell v. Paperworkers*, 965 F.2d 1401, 1410–11 (6th Cir. 1992) (Section 10(j) injunction not mooted by respondent's compliance with court's order); *United*

[11] Shamrock's argument is based on an extra-record declaration attached to Shamrock's pending Motion to Supplement the Record. Should the Court deny Shamrock's Motion, Shamrock's argument addressed here should be stricken from its opening brief.

States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case . . ."). The§10(j) injunction is in place until the Board issues its decision in the administrative case. *See, e.g.*, *Frankl I*, 650 F.3d at 1342 (noting that issuance of final Board decision can moot § 10(j) proceeding); *Miller v. California Pacific Med. Ctr.*, 19 F.3d 449, 453 (9th Cir. 1994) (noting resolution of § 10(j) proceedings rendered moot by Board's decision on the merits). Until that point, there is a continuing need for interim relief.

Further, Shamrock completely misrepresents the import of the case it relies on to establish mootness. It is true that the Ninth Circuit, in *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987), dismissed that agency's claim for backpay for an employee who "contracted away her right to back pay." *Id*. at 1543. Despite its holding on the backpay claim, the *Goodyear* court also found that an injunction could be necessary to protect the public interest, finding that an injunction would "(1) instruct Goodyear that it must comply with federal law, (2) subject it to the contempt power of the federal courts if it commits future violations, and (3) reduce the chilling effect of its alleged retaliation on its employees' exercise of their Title VII rights." *Id*. at 1544. For that reason, the *Goodyear* court upheld the district court's dismissal

of the agency's request for backpay, but reversed and remanded for the district court to consider whether an injunction was in the public interest. *Id*. at 1545. *Goodyear* thus instructs that Wallace's current position on reinstatement is irrelevant where the district court found that an injunction is in the public interest.

Indeed, where the district court ordered reinstatement, and the question on appeal is whether the court abused its discretion on the record before it, an argument that the order should be overturned because Shamrock has now complied with it is both circular and meritless. *Cf. Kaynard v. MMIC, Inc.*, No. 83-0715, 1983 WL 2104, at *2 (E.D.N.Y. Oct. 31, 1983) (interim reinstatement order moot where employee declined offer of reinstatement prior to § 10(j) proceeding), *affirmed on other grounds*, 734 F.2d 950 (2d Cir. 1984).

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order.

VIII. STATEMENT OF RELATED CASES

Board Counsel is not aware of any other cases pending before the Ninth Circuit involving petitions for injunctive relief under § 10(j).

Respectfully submitted,

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Dated at Washington, D.C.
March 31, 2016

CERTIFICATE OF COMPLIANCE

I certify that the attached Brief has been produced using Microsoft Word in 14-point proportionally-spaced typeface "Times New Roman" and contains approximately 12,887 words. It is, therefore, in compliance with Fed.R.App.P. 32(a)(7)(B) and Ninth Circuit Rule 32-1.

/s/ Amy L. Cocuzza
Amy L. Cocuzza
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National Labor Relations Board

Dated at Washington, D.C.
this 31st day of March 2016

CERTIFICATE OF SERVICE
All Case Participants are CM/ECF Participants

I hereby certify that on March 31, 2016, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, D.C.
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STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151 et. seq.

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) (29 U.S.C. § 158(a)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Section 10(j) (29 U.S.C. § 160(j)):

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.